No. 15369

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UTILITY APPLIANCE CORPORATION, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

REGULATIONS AND RULES PAGE

STATUTES

MISCELLANEOUS

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Jurisdiction.

This proceeding involves determination of federal excess profits taxes for the calendar year 1944. The jurisdiction of this court is based on sections 1141 and 1142, I. R. C. 1939, as continued in effect by section 7851(b)(1), I. R. C. 1954. The jurisdiction of the Tax Court was based on section 732, I. R. C. 1939.

The notice of deficiency was issued October 8, 1952. [R. 12.] On December 12, 1952, petitioner filed a petition in the Tax Court of the United States. [R. 3.] The Tax Court's decision was entered July 26, 1956. [R. 4.] On October 19, 1956, petitioner filed its petition for review herein and served upon respondent notice of the filing thereof. [R. 4.]

Petitioner is a California corporation. Its principal office is at Beverly Hills, California. Its returns were filed with the Collector of Internal Revenue for the Sixth District of California. [R. 24.]

The jurisdiction of this court is not denied by I. R. C. 1939, section 732(c). The reason is that while the issue here arises under section 722(d), that section expressly makes such issue dependent upon section 322. As a result the issue here is not one the determination of which is necessary solely by reason of section 722.

Statement Regarding Statutory Provisions Involved.

The pertinent provisions of the Internal Revenue Code of 1939 are shown herein in the Appendix.

Under the World War II excess profits tax law provisions were enacted for the purpose of limiting the subject of that tax to the excess profits resulting from war activity. As a means to that end, taxable income otherwise computed for the purpose of that tax was reduced by an "excess profits credit" intended to represent the normal earnings of the taxpayer. Under section 713 of I. R. C. 1939, the excess profits credit was computed by taking 95 per cent of the corporation's "average base period net income," the latter being a factor determined under several alternative formulae on the basis of the income of the corporation for the years 1936 to 1939, inclusive, known as the "base period." Under section 714 the credit was computed by taking 8 per cent of the corporation's invested capital. Whichever resulted in the lower excess profits tax was applicable.

In computing net income both for income tax and excess profits tax purposes, a net operating loss in any

year could be carried back and forward, two years in each direction. Thus a net operating loss in 1945 would be carried back to 1943, that is, allowed as a deduction in 1943. Any excess over the net income otherwise computed for 1943, in other words the amount of the carry-back not used up in 1943, would be allowed as a deduction in 1944. A similar scheme, applicable only to excess profits taxes, was the "unused excess profits credit" carry-back and carry-over, also two years in each direction. The "unused excess profits credit" for any year was the excess of the excess profits credit for that year over the net income for that year as determined for excess profits tax purposes. Thus, if a corporation had such an unused excess profits credit for 1945, it would be carried back to 1943 and any portion thereof not used up in 1943 would be allowed in 1944.

Conceiving the possibility that the formulae of sections 713 and 714 would not actually arrive at normal earnings in many cases, Congress included a general relief provision, section 722. In section 722(b) specific situations were set forth under which relief was to be allowed. In the case at bar relief was sought under section 722(b)(4), which applied where "the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business." It was also provided, under section 722(a), that conditions occurring or existing after 1939 could not be taken into account except in certain limited situations for the purpose of determining "normal earnings." Nowhere under any provision of statute or regulation was it possible for "normal earnings" to be different for the

made by the Commissioner and a revenue agent's report was issued under date of June 10, 1947. [R. 25.] In that report a carry-back of unused excess profits credit from 1945 to 1944, computed as before without regard to section 722, was allowed. [R. 25.] Subsequently, in 1948 and 1949, additional excess profits taxes were assessed and paid for 1944. [R. 27.] In the computation of those additional taxes, that carry-back from 1945 to 1944 of unused excess profits credit was still allowed. [R. 30.] In the deficiency notice which the Commissioner eventually issued for 1944, on October 8, 1952, and which resulted in the petition here involved to the Tax Court, that carry-back of unused excess profits credit from 1945 to 1944 was still allowed. [R. 24-25.]

The application for relief which petitioner filed for 1944 on May 15, 1945, was on Form 991 as required and was supported as to evidentiary details concerning the base period by a reference to statements attached to the corresponding application filed by the petitioner for the year 1942. [R. 27.] Nothing in the form required the petitioner to disclose how the amount of reduced tax claimed was computed and no such schedule was attached. [R. 27.]

On February 28, 1949, petitioner filed a claim for refund on Form 843, as a supplement to the application for relief for 1944 filed on Form 991, to show the payments of tax made after that application was filed. [R. 28.] The Tax Court states that the application filed on Form 991 and the claim filed on Form 843 "compre-

hended" a constructive average base period net income for 1944 "without claiming the benefit of any carry-back of unused excess profits credit from 1945 computed either with or without regard to section 722." [R. 28-29.] As to the application filed on Form 991, that, as observed above, contained no statement showing how the reduced tax claimed was computed, nor was any such statement required by the form. As to the Form 843 filed on February 28, 1949, after, as noted above, a carry-back of unused excess profits credit was in three different determinations allowed by the Commissioner, and never refused, the failure to include in the computation a factor for *any* carry-back of unused excess profits credit obviously represented a mere oversight which the Commissioner, in his notice of deficiency, waived, a carry-back being in such notice allowed.

On May 7, 1951, petitioner mailed a letter to the Excess Profits Tax Council, the division of the Commission's office before which petitioner's applications for relief were then pending on the merits, specifically claiming that the carry-back from 1945 be determined by employment of a constructive average base period net income for 1943 and 1945. That letter also pointed out that the carry-back had been a matter of discussion in conference with the office of the Commissioner's "Internal Revenue Agent in Charge" and with the Commissioner's "Technical Staff," and specifically referred in that connection to a letter from the Internal Revenue Agent in Charge dated December 3, 1948. [R. 30-31.] The Excess

Profits Tax Council acknowledged that letter in writing. [R. 31.] Nowhere does the record show any denial by respondent of the fact of the discussion referred to.

Several conferences and considerable correspondence with the office of the Commissioner relating to the merits of the case occurred after the date of that letter and before the Commissioner's final determination. [R. 31.] The final determination of the Commissioner was made on September 19, 1952. [R. 31.] That determination was formally issued as a statutory notice on October 8, 1952. [R. 12.] The Commissioner in that statutory notice granted relief under section 722 for all years in which excess profits tax had been paid and not previously refunded, that is, the years 1940, 1941, 1942, and 1944. He thus determined and applied a constructive average base period net income for each of those years. [R. 15.] In determining the amount of reduced tax for 1944 he also allowed a carry-back of unused excess profits credit from 1945 to 1944 but in computing that carry-back he refused to apply a constructive average base period net income computed under section 722 for 1943 and 1945. [R. 24-25, 16.]

He based such refusal on the ground that no timely application for relief in respect to 1943 and 1945 for carry-back purposes had been filed. [R. 16.] He agreed, however, that the amount of such constructive average base period net income would, if a timely application in respect thereto had been filed, be the same as for the years 1941, 1942, and 1944. [R. 15-16.] 1940 was in

a separate category because of the "variable credit rule" referred to above, p. 4, and also because of the deduction allowed only for that year for income taxes. (I. R. C. 1939, section 711(b)(1)(A), repealed, Rev. Act of 1941, section 202(c)(2).)

Thereupon petitioner filed its petition in the Tax Court. [R. 3.] In that petition, petitioner assigned two errors, one as to the Commissioner's refusal to use a constructive average base period net income for 1943 and the other as to his refusal to use a constructive average base period net income for 1945, both in connection with the computation of the unused excess profits credit carry-back from 1945 to 1944. [R. 7.] In the Tax Court respondent conceded the use of a constructive average base period net income for 1943 in arriving at the said carry-back. [R. 25.]

Thus the Commissioner allowed a carry-back of unused excess profits credit from 1945 to 1943 and 1944, and in determining the portion of that carry-back used up in 1943, and thereby the balance remaining for 1944, he allowed the use of a constructive average base period net income computed under section 722 for 1943. The sole issue, then, which remained to be decided by the Tax Court was whether the application for relief filed for 1944 was effective to allow use of a constructive average base period net income computed under section 722, for 1945 also, in determining the balance of the unused excess profits credit for that year to be carried back to 1944.

Specifications of Error.

Petitioner specifies the following error of the Tax Court:

The failure to determine that the application for relief filed for 1944, as timely amended, was effective to allow use of a constructive average base period net income computed under section 722 for 1945 in determining the portion of the unused excess profits credit for that year to be carried back to 1944.

Summary of Argument.

The forms and other information which petitioner timely filed with the Commissioner complied with the statute and the regulations as claim for use of a constructive average base period net income for 1945 in computing the unused excess profits credit carry-back from that year. Petitioner filed the required application for relief within the time allowed. No other claim is required by the statute. Petitioner also within that time furnished all of the information required.

Petitioner likewise made the claim of carry-back of unused excess profits credit required by the regulations. Such a carry-back, computed without regard to section 722, was allowed by the Commissioner in every computation made by the Commissioner both before and after the expiration of the period of limitations on filing claims for 1944. This included every computation made by the Commissioner in connection with the application for relief for 1944 involved in this proceeding.

There was, it is true, during the period allowed for filing claims, no specific written request for the use of a

constructive average base period net income for 1945 in computing the carry-back involved. The regulations, however, do not require that. Moreover, the Commissioner allowed a constructive average base period net income for each one of the prior years, that is, 1941, 1942, 1943, and 1944, in an identical amount for each such year, and the facts required for 1945, being facts relating to the base period only, were identical in all respects to those required for the years 1941 through 1944. The Commissioner has, in fact, agreed that the constructive average base period net income for 1945, if timely claimed, would also be the same amount as for each of the years 1941 through 1944. Under such circumstances the Tax Court itself has treated the use of a constructive average base period net income in computing a carry-back as automatic so as to be allowable without even mention in the pleadings.

In any case, while the application for relief for 1944 was pending on the merits before a division of the Commissioner's office, petitioner did make a specific written request for use of a constructive average base period net income for 1945 in computing the carry-back to 1944. Since all of the information required was already before the Commissioner and no new or different examination was involved such request was a proper amendment of the original claim although made after the period for filing claims had expired. Furthermore, the Commissioner made a determination on the merits of such constructive average base period net income for 1945 and thereby waived any defect in the original claim.

ARGUMENT.

1.

Petitioner Timely Filed the Form Required by the Regulations for the Purpose of an Unused Excess Profits Credit Carry-back for 1945 Computed by Use of a CABPNI for That Year.

The statute, section 722(d), requires only that an application for relief be made "in accordance with regulations prescribed by the Commissioner with the approval of the Secretary." The regulations so prescribed, Regulations 112, section 35.722-5(a), provide to the extent pertinent as follows:

> "In order to obtain the benefits of an unused excess profits credit for any taxable year for which an application for relief on Form 991 (revised January, 1943) was not filed, using the excess profits credit based on a constructive average base period net income as an unused excess profits credit carry-over or carry-back, the taxpayer, except as otherwise provided in (d) of this section, must file an application on Form 991 (revised January, 1943) for the taxable year *to which* such unused excess profits credit carry-over or carry-back is to be applied within the period of time prescribed by Section 322 for the filing of a claim for credit or refund for such latter taxable year." (Italics added.)

Petitioner complied with this requirement, for it filed, on May 15, 1945, an application for relief on Form 991, for the taxable year 1944. No schedule was attached showing how the reduced tax claimed was computed but no such schedule was required by the form.

2.

Petitioner Submitted All of the Information Required by the Regulations for an Unused Excess Profits Credit Carry-back From 1945 Computed by Use of a CABPNI for That Year.

Respondent will point to the sentence in the regulations which follows that quoted above. That sentence is:

> "In addition to all other information required, such application shall contain a complete statement of the facts upon which it is based and which existed with respect to the taxable year for which the unused excess profits credit so computed is claimed to have arisen, . . ."

In its application for relief for 1944, petitioner incorporated by reference the statements giving the details concerning the base period which it had attached to applications for relief for prior years. The facts required for determination of a constructive average base period net income for 1945 could not be any different, not even one iota, from the facts required and submitted as to the prior years. The facts required were facts relating to the base period and not to the respective excess profits tax taxable years. This is shown by the fact that the Commissioner has agreed that the same CABPNI which applied to 1944, 1943, 1942, and 1941 would also apply to 1945 if the claim was timely in respect to that year. This is also shown by the case of *Jacob's Fork Pocahontas Coal Company v. Commissioner,* 24 T. C. 60. There the taxpayer, just as petitioner here, sought relief under section 722(b)(4). A decision of the Tax Court denying relief had been entered in respect to the excess profits tax years 1940, 1941, and 1942, and the taxpayer sought such relief for the years 1943, 1944, and 1945. The

Tax Court there held on the basis of collateral estoppel that the proceeding for the later years was concluded by that for the earlier. The Tax Court there stated that the basis for relief "must have foundation in the same set of facts."

To the same effect, *George Kemp Real Estate Company v. Commissioner,* 17 T. C. 755, affirmed C. A. 2, 205 F. 2d 236, cert. denied 346 U. S. 876. And in *Ainsworth Manufacturing Corporation v. Commissioner,* 24 T. C. 173, the Tax Court held that where, as here, the "variable credit rule" was inapplicable to the unused excess profits credit year, a CABPNI for that year could be applied under Rule 50, as a mere matter of computation, even though no claim therefor had been made in the pleadings.

It follows that petitioner complied with the requirement in the regulations above quoted "for a complete statement of the facts" in respect of the unused excess profits credit year, that is, 1945.

3.

Petitioner Made the Necessary Claim for Carry-back Based on a CABPNI for 1945.

(a) Petitioner Made the Claim of Benefit of the Unused Excess Profits Credit Carry-back Required by the Regulations Promulgated Under Section 722.

Respondent will point to the requirement in the same regulations quoted above that the application for relief shall "claim the benefit of the unused excess profits credit carry-over or carry-back." But the claim for such a benefit was made, although not on that form. It was made in the claim for tentative carry-back. It was allowed by the revenue agent in the revenue agent's report dated June 10, 1947. It was involved in discussions with

the Internal Revenue Service. Indeed, it was formally allowed by the Commissioner, as shown by his deficiency letter.

All of these procedures, including the tentative carry-back claim, the revenue agent's report, the discussions, and the final allowance of a carry-back, must be given effect as informal pieces of information in determining what grounds were presented. *Keneipp v. U. S.* (App. D. C.), 184 F. 2d 263. To the same effect, *Bonwit Teller & Company v. U. S.*, 283 U. S. 258, where the Supreme Court stated, at p. 265:

> "The Commissioner, within the time allowed, was advised of the grounds on which plaintiff's right to refund rested, and was not misled or deceived by plaintiff's failure to file formal claim and was fully warranted in holding that the waiver and earlier documents were sufficient. *Tucker v. Alexander,* 275 U. S. 228, 231."

In the *Tucker* case there cited the Supreme Court stated, at p. 231:

> "The statute and regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery."

It is clear that the claim of an unused excess profits credit carry-back was timely made by petitioner and that the Commissioner was in full notice of its claim.

It is true that within the time allowed for filing claims there was no specific written request for the employment of a CABPNI in computing the unused excess

profits credit carry-back. But the form provided, Form 991, does not require this. Nor do the regulations themselves, as quoted above, require this. They require only that there be a claim for the benefit of the unused excess profits credit carry-back.

No perfection of phrasing is required by the regulation. Nor could it be required. If the regulations require more they go too far. *Miller v. Commissioner* (C. A. 5), 237 F. 2d 830, 836-37. As stated in *United States v. Memphis Cotton Oil Co.,* 288 U. S. 62, 53 S. Ct. 278, at 288 U. S., p. 71:

> "The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research."

Respondent cannot point to a single fact which could possibly have been added to its information by such a nicety of wording in the application for relief as a request specifically for employment of the CABPNI in computing the unused excess profits credit for 1945.

(b) The Special Statutory Provision on Limitations Relating to Carry-back Claims, Section 322(b)(6) of I. R. C. 1939, Being a Relief Provision, Should Be Liberally Construed.

All that section 722(d) requires that there be filed within the period prescribed in section 322 is an "application for relief"—nothing more. Section 322(b)(6), relating to carry-backs, merely enlarges the time allowable to the extent to which a claim is based on carry-back.

Claremont Waste Manufacturing Co. v. Commissioner (C. A. 1), 238 F. 2d 741, decided November 16, 1956, where the court stated, at p. 748:

> "Thus, as the Tax Court pointed out, the purpose of section 322(b)(6), as amended, was in general to provide a special period of limitation over and above the three-year period found in section 322(b)(1) for claims for refund based on credit carry-backs, 'since the extent or existence of unused credits might often be unknown to the taxpayer until after the normal peroid of limitations for such claims had expired.'"

In *Bonwit Teller & Company v. U. S., supra,* precisely involving such a situation the Supreme Court stated, at p. 263:

> "Manifestly it [the increase in time allowed] is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide."

(c) It Has Also Been Held That the Unused Excess Profits Credit Carry-back Is Mandatory, and That No Actual Claim Is Required.

The unused excess profits credit carry-back may in certain situations increase instead of decrease the tax. The application of the carry-back, it has been held, is mandatory. It follows that the taxpayer has no choice, and that an actual claim is not necessary. The Commissioner's contention to that effect has been upheld by the Court of Claims in *Dravo Corporation v. U. S.,* 138 F. Supp. 274.

4.

Even if the Original Claim Filed Was Defective Because It Did Not Expressly Request That the Unused Excess Profits Carry-back From 1945 Be Computed by Employment of a CABPNI for 1945, Such Defect Was Cured by Petitioner's Letter of May 7, 1951, to the Excess Profits Tax Council.

(a) The Letter of May 7, 1951, Was Properly Addressed to the Excess Profits Tax Council.

At the time the letter was sent the application for relief was being considered on the merits by the Excess Profits Tax Council. The Council formally acknowledged the letter, and thereafter a determination of CABPNI for 1945, the year here involved as the unused excess profits tax year, was made by the Commissioner.

The Excess Profits Tax Council is a field group established under the Commissioner of Internal Revenue to make final determinations for him on all matters involving section 722 of I. R. C., 1939. Mim. 6044, 1946-2 C. B. 97. The issue here involves section 722(d), by virtue of which the time for filing applications for relief is made to depend on section 322. The timeliness of the application for relief was, moreover, necessarily before the Council, because the existence of a proper application was essential to the determination of relief, precisely as, in *United States v. California Eastern Lines,* 348 U. S. 351, 354-355, involving a determination of the amount of profits, "the existence of a renegotiable contract" was "essential to such a determination."

(b) The Letter of May 7, 1951, Presented No New Ground for Relief, but Was Only Amendatory of the Grounds Stated in the Original Application.

On this question a claim is like a pleading. Thus, in *United States v. Andrews,* 302 U. S. 517, the Supreme Court stated, at p. 521:

> "We held that, while the Commissioner might promptly have rejected the claims for failure to comply with the regulation, such compliance was a matter he could waive and, if he considered the merits, the claim was susceptible of any amendment which would not amount, under the rules of pleading in actions of law, to an alteration of the cause of action and would not require the Commissioner to make a new and different inquiry than that which he was called upon to make in order to consider the general grounds asserted in support of the claim as presented."

Here clearly there is no change in the cause of action. The relief sought was a reduction in excess profits tax for 1944 under the provisions of section 722, I. R. C. 1939.

Furthermore, as shown above, under Point 2, no new facts were involved in the amendment here. In *Addressograph-Multigraph Corp. v. U. S.,* 112 Ct. Cls. 201, 78 F. Supp. 111, the court quoted from *Pink v. U. S.* (C. A. 2), 105 F. 2d 183, as follows:

> "Where the facts upon which the amendment is based would necessarily have been ascertained by the Commissioner in determining the merits of the original claim, the amendment is proper. *Bemis Bro. Bag Co. v. U. S.,* 289 U. S. 28; *United States v. Memphis Cotton Oil Co.,* 288 U. S. 62; *United States v. Factors and Finance Co.,* 288 U. S. 89. The

> rule is otherwise when the amendment requires the examination of new matters which would not have been disclosed by an investigation of the original claim. *United States v. Andrews,* 302 U. S. 517; *United States v. Garbutt Oil Co.,* 302 U. S. 528; *Marks v. United States,* 98 Fed. (2d) 564."

To the same effect, *Allegheny Heating Co. v. Lewellyn* (C. A. 3), 91 F. 2d 280. The court there, distinguishing other cases, stated, at p. 283:

> "In the instant case, as we have seen, the amendment was fundamentally related to the original claim, in that it involved no new facts whatever so far as the taxpayer, its income and records were concerned, but merely the application of a different remedy based upon the same facts."

As in that case, so here, no new facts whatever were involved. The facts involved related only to the base period. It follows that the letter of May 7, 1951, presented no new ground for relief, but was only amendatory of the grounds stated in the original application, and therefore cured any defect in the original application covered by the amendment.

5.

It Is Immaterial That the Letter Was Filed After the Statute Had Run.

At the time the letter of May 7, 1951, was filed, the claim was still being considered on the merits and many conferences followed. The Commissioner even made a determination of what the CABPNI would be for use in computing the unused excess profits credit for 1945. Not until that final decision of his did he complain that the claim was not timely filed or that the claim timely

filed was defective in respect to carry-back. In *United States v. Elgin National Watch Co.* (C. A. 7), 66 F. 2d 344, 346, 10 Mertens (Revised 1948) 332, n. 90, the original claim was defective, and the amendment was made after the statute had run. The case there also involved excess profits tax relief, which was known at that time as "special assessment." The original claim was defective in that it failed to set forth in detail each ground upon which it was based. The Commissioner, however, had failed to object to that defect until the time for payment had arrived. The court there, overruling the Commissioner, stated, at page 346:

> "That the Commissioner may waive such an objection to form we think there can be no doubt."

The court there also, citing, among others, the case of *United States v. Memphis Cotton Oil Co., supra,* stated, at page 347:

> "Those cases hold that a claim for a tax refund which has been seasonably filed, but which fails to conform to Treasury Regulations, may be amended at any time before the original claim has been finally rejected, although it be after the time when a wholly new claim would be barred by limitation."

To the same effect, *Allegheny Heating Co. v. Lewellyn, supra.*

Indeed, it seems that the Tax Court because of this point has now repudiated the decision which it rendered in this very proceeding. In *Wilmington Gasoline Company v. Commissioner,* 27 T. C. #55, decided December 12, 1956, the Tax Court, citing *United States v. Memphis Cotton Oil Co., supra,* and *Angelus Milling Co. v. Commissioner,* 325 U. S. 293, decided for the taxpayer on the basis of facts identical to the facts here. There, as

here, there had been a claim for carry-back of unused excess profits credit not based on section 722. That claim, having been allowed, was in itself no longer in existence and could not as a result itself be amended. *Mutual Life Ins. Co. v. U. S.* (Ct. Cls.), 49 F. 2d 662, cert. denied, 284 U. S. 628; 10 Mertens ¶58.19. The Tax Court nevertheless recognized it as a factor before the Commissioner in connection with a timely application for relief under section 722, and held that an amendment after the statute had run claiming determination of the carry-back under section 722 was timely. The court there quoted from the *Angelus Milling Co.* case in part as follows:

> "If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action upon it. Even tax administration does not as a matter of principle preclude considerations of fairness."

It is clear that the Tax Court itself is no longer in agreement with its decision in this proceeding and that if the Tax Court had this case before it again it would hold, as it should, that the letter of May 7, 1951, properly amended petitioner's application for relief although sent after the statute had run.*

As to the supplementary claim filed by petitioner on February 28, 1949, in which through obvious oversight

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*While this is not of record before this court, respondent in its brief before the Tax Court in the *Wilmington Gasoline Company* case cited the Tax Court's decision in the case here six times and placed its entire reliance upon it. It appears that the Tax Court there deliberately repudiated its decision in the case here.

petitioner omitted to make a separate addition for *any* carry-back, computed with or without regard to section 722, it is of course clear that the Commissioner's subsequent allowance, in his statutory notice, of a carry-back computed without regard to section 722, his allowance thereafter in computing that carry-back of a CABPNI under section 722 for 1943, and his further computation of what the CABPNI would be for 1945, represent a complete waiver of that omission, under the principles stated above.

6.

It Is Immaterial That the Amendment Was Made by Letter Instead of on a Form.

In *United States v. Kales,* 314 U. S. 186, 62 S. Ct. 214, a letter of protest to the Commissioner was held to constitute a claim for refund. In *Bonwit Teller & Company v. U. S., supra,* a waiver was held to constitute a claim for refund. In *Crenshaw v. Hrcka* (C. A. 4), 237 F. 2d 372, decided October 16, 1956, a letter saying that the taxpayer there would pay certain assessments and then claim a refund was held to constitute a claim for refund. To hold otherwise, the court there stated, at p. 373, would be "to return to the reign of senseless technicality from which the courts have happily freed themselves." In the *Elgin* and *Allegheny* cases, cited above, briefs were treated as claims. As all these cases show, if a claim is considered on the merits, its informality is waived. As the *Elgin* and *Allegheny* cases also show, that is just as true of an amendment to a claim, filed after the statute has run, as of an original claim. As shown in *Smale & Robinson, Inc. v. U. S.* (D. C., S. D., Cal.), 123 F. Supp. 457, the cases supporting that proposition are legion.

Conclusion.

Petitioner states in conclusion that it did all that was necessary in bringing to the notice of the Commissioner its claim for the use of a constructive average base period net income for 1945 in computing the portion of its unused excess profits credit for 1945 to be carried back to 1944, and that the use of such a constructive average base period net income should have been allowed.

Respectfully submitted,

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APPENDIX.

Statutory Provisions Involved.

Internal Revenue Code of 1939.

SEC. 322. REFUNDS AND CREDITS.

* * * * * * * * *

(b) Limitation on Allowance.—

(1) Period of Limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * * * * * *

(6) Special Period of Limitations With Respect to Net Operating Loss Carry-Backs and Unused Excess Profits Credit Carry-Backs.—If the claim for credit or refund relates to an overpayment attributable to a net operating loss carry-back or to an unused excess profits credit carry-back, in lieu of the three-year period or limitation prescribed in paragraph (1), the period shall be that period which ends with the expiration of the fifteenth day of the thirty-ninth month following the end of the taxable year of the net operating loss or the unused excess profits credit which results in such carry-back, or the period prescribed in paragraph (3) in respect of such taxable year, whichever expires later. In the case of such a claim, the amount of the credit or refund may exceed

the portion of the tax paid within the period provided in paragraph (2) or (3), whichever is applicable, to the extent of the amount of the overpayment attributable to such carry-back.

SEC. 722. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) General Rule.—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that in the cases described in the last sentence of section 722 (b)(4) and in section 722(c), regard shall be had to the change in the character of the business under section 722(b)(4) or the nature of the taxpayer and the character of its business under section 722(c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) Taxpayers Using Average Earnings Method.—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to

use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

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(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. * * *

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(d) Application for Relief Under This Section.—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710(a)(5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

SEC. 732. REVIEW OF ABNORMALITIES BY BOARD OF TAX APPEALS [NOW THE TAX COURT OF THE UNITED STATES].

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(c) Finality of Determination.—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721 or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board.

Regulations 112, Section 35.722-5(a).

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In order to obtain the benefits of an unused excess profits credit for any taxable year for which an application for relief on Form 991 (revised January, 1943) was not filed, using the excess profits credit based on a constructive average base period net income as an unused excess profits credit carry-over or carry-back, the taxpayer, except as otherwise provided in (d) of this section, must file an application on Form 991 (revised January, 1943) for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied within the period of time prescribed by section 322 for the filing of a claim for credit or refund for such latter taxable year. In addition to all other information required, such application shall contain a complete statement of the facts upon which it is based and which existed with respect to the taxable year for which the unused excess profits credit so computed is claimed to have arisen, and shall claim the benefit of the unused excess profits credit carry-over or carry-back. If an

application on Form 991 (revised January, 1943) for the benefits of section 722 has been filed with respect to any taxable year, or if the filing of such application is unnecessary under (d) of this section, and if the excess profits credit based upon a constructive average base period net income determined for such taxable year produces an unused excess profits credit for such year, to obtain the benefits of such unused excess profits credit as an unused excess profits credit carry-over or carry-back the taxpayer should file an application upon Form 991 (revised January, 1943), or an amendment to such application if already filed, for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied. Such application or amendment should be filed within the period of time prescribed by section 322 for the filing of a claim for credit or refund for the taxable year to which the carry-over or carry-back is to be applied. In addition to all other information required, such application or amendment should incorporate by reference the data and information submitted in support of the application filed for the taxable year for which the unused excess profits credit arose, and in addition should claim the benefit of the unused excess profits credit carry-over or carry-back. * * *